SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES,

Petitioner,

against

VICTORY TRANSPORT INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Questions 1 and 2, set forth on page 2 of the petition, are more accurately stated as follows:

1. Whether a foreign governmental agency not entitled to sovereign immunity, by agreeing in a charter party made in New York with a vessel owner located in New York to arbitrate disputes thereunder in New York, can be held to have consented to the *in personam* jurisdiction of the federal district court in New York under the Federal Arbitration Act to compel it to proceed to arbitration of such disputes.

2. Whether the extraterritorial service of a petition and notice of petition to compel arbitration by registered mail pursuant to an order of the federal district court in New York is sufficient under the Federal Arbitration Act

to sustain *in personam* jurisdiction to compel a foreign governmental agency which has agreed to arbitrate any disputes in New York and is not entitled to sovereign immunity, to proceed to arbitration of such disputes.

Statement

Petitioner, a foreign governmental agency engaged in the grain business, voyage-chartered respondent's vessel and agreed in the charter party to arbitrate any disputes in New York. The charter party was made in New York, dated in New York, negotiated by brokers located in New York, provided for payment of general average in New York and was signed in New York by respondent which has its offices in New York.

Petitioner seeks review on writ of certiorari of the unanimous decision of the Court of Appeals for the Second Circuit, affirming the decision and order of the District Court for the Southern District of New York granting respondent's petition to compel arbitration and denying petitioner's cross-motions attacking the jurisdiction of the Court over the subject matter and the person of the petitioner.

The Courts below determined the transactions between petitioner and respondent to be commercial in nature and rejected petitioner's plea of sovereign immunity in accordance with the established policy of the State Department against recognizing immunity in such cases as expressed in the letter addressed on May 19, 1952, to the Acting Attorney General by the Acting Legal Adviser for the Department of State, Jack B. Tate, entitled "*Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*", 26 State Dept. Bull. 984, 1952.

The Courts below upheld the service by registered mail of the petition and notice of petition to compel arbitration

in accordance with established practice under New York State law, as made applicable by the Federal Rules of Civil Procedure, in turn made applicable by Section 4 of the Federal Arbitration Act (9 U. S. C. Sec. 4), permitting such service where, by agreeing to arbitration in New York, the parties had consented to *in personam* jurisdiction there. *Orion S. & T. Co.* v. *Eastern States Petrol Co. of Panama* (2nd Cir.), 284 F. 2d 419 (1960); *Farr & Co.* v. *Cia Internacional de Navegacion* (2nd Cir.), 243 F. 2d 342 (1957); *Necchi Sewing Machine Sales Corp.* v. *Sewline Co.*, 194 F. Supp. 602 (SDNY 1960); *Gilbert* v. *Burnstine*, 255 N. Y. 348 (1931); *Prosperity Company, Inc.* v. *American Laundry Machinery Co.*, 297 N. Y. 486 (1947).

There is no material or special and important distinction to be drawn between the extraterritorial service upheld by these decisions and the identical service effected upon a commercial branch of a foreign sovereign not entitled to sovereign immunity by reason of the private commercial nature of its activities.

Argument

The characterization by the Courts below of the voyage-charter transactions between petitioner and respondent as commercial in nature and thus not the proper subject of a sovereign immunity plea, is of importance primarily to the litigants herein and does not pose any special and important new question for consideration by this Court.

Recognizing this, petitioner avoids a frontal attack upon those determinations, avoids reference to the Tate Letter, *supra,* and omits reference to key decisions of this Court declaring the guiding principle for the Courts to follow in determining whether to exercise or to surrender jurisdiction where sovereign immunity is claimed to be to harmonize with, and avoid embarrassment to, the Executive in its conduct of foreign affairs. *Mexico* v. *Hoff-*

man, 324 U. S. 30 (1945); *The Navemar*, 303 U. S. 68 (1938).

Instead, the petition urges (pp. 12, 13) that petitioner's sovereign status precludes the exercise by the Courts below of jurisdiction to determine whether petitioner is entitled to sovereign immunity and then proceeds to attack the validity of the extraterritorial service herein employed solely on the basis of its sovereign status (see particularly page 21 of the petition).

But if petitioner is not entitled to sovereign immunity so as to preclude the exercise by the courts of jurisdiction over the subject matter, then petitioner must occupy the same position in challenging the extraterritorial service herein that any other foreign business concern which has voyage-chartered a vessel and agreed to arbitration in New York, would occupy. To hold otherwise would completely thwart the policy of the Executive expressed in the Tate Letter, *supra*, by disregarding that policy so far as *in personam* jurisdiction, always primary to subject matter jurisdiction, is concerned.

Following through on the same defective premise, the petition urges the granting of the writ to resolve a conflict between the decisions below and certain decisions of English tribunals, contending that review is appropriate "to determine if uniformity is desirable in this area of international law" (p. 15). But the Executive in the Tate Letter, *supra*, in announcing the change of policy from the so-called "classical" or "absolute" theory to the "restrictive" theory of sovereign immunity, noted that the two conflicting concepts of sovereign immunity are each widely held and firmly established throughout the world. Uniformity is thus impossible whether or not desirable.

Moreover, as the Department of State observed in the Tate Letter, *supra*, England is one of the states still adhering to the "absolute" theory of sovereign immunity

which the Department has rejected. Thus, the Executive has adopted a policy in conflict with English decisions with which the petition states the decision below to be in conflict. Since this Court has indicated in *National City Bank* v. *Republic of China*, 348 U. S. 356; *Mexico* v. *Hoffman*, *supra*; and *The Navemar*, *supra*, that the policies of the Executive must govern, it certainly should not grant review to determine whether uniformity with the English decisions is desirable.

Petitioner's more narrow contention that the initial service by registered mail, prior to July 1, 1963, did not comply with the Federal Rules of Civil Procedure, as incorporated in Section 4 of the Arbitration Act, can hardly present special and important questions for this court's consideration. In view of the later addition to Rule 4 of subsection (i) broadly permitting a wide range of modes of service in foreign countries, with which the second service herein complied, these questions are of purely historical interest. Moreover, the initial service was sufficient.

Petitioner does not appear to deny that New York State law permits the extraterritorial service pursuant to court order here employed. Section 1450 of the New York Civil Practice Act, in effect at the time of the first service, provided as to notice of petitions to compel arbitration that upon satisfactory proof that substituted service or personal service could not be made, the notice could be served in such manner as the court might direct. The New York Court of Appeals has upheld such service by registered mail. *Gilbert* v. *Burnstine*, *supra*; *Prosperity Co., Inc.* v. *American Laundry Machinery Co.*, *supra*.

Petitioner's technical objection to the initial service appears to be that because as a branch of the Spanish Government it is not an individual (Federal Rule of Civil Procedure 4(d) (1)) nor, it claims, "a domestic or foreign corporation" or "partnership or other unincorpo-

rated association which is subject to suit under a common name" (Rule 4(d) (3)), Rule 4(d) (7) allowing the use of state court practice regarding service of process upon those classes of defendants is not applicable.

The court below, observing that no rule of international law requires special treatment for serving branches of foreign sovereigns, held that Rule 4(d) (3) is broad enough to cover petitioner. It also held that the initial service of the petition and notice of petition to compel arbitration herein, pursuant to the March 22, 1963, order of Judge Dawson, was authorized by Rule 4(e), which then provided in part:

> "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of a summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order."

The only American decision referred to in the petition concerning extraterritorial service on a foreign government, *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (SDNY 1960), supports respondent and the courts below. There, Chief Judge Ryan, in holding that the exacting requirements of the New York Civil Practice Act concerning substituted service and service by publication had not been complied with by the service on the Government of Cuba in that case, stated:

> "The federal rules provide that service of process which is permissible within the state wherein the court sits, will be deemed sufficient service of process in the district court. Thus, if the Courts of New York State would permit service of process in the instant proceedings, that service would be valid in this Court." (p. 128)

The court in *Berlanti Construction Co.* v. *Republic of Cuba*, *supra*, plainly regarded Cuba as "domestic or foreign

corporation" or "partnership or other unincorporated association which is subject to suit under a common name" within the meaning of Rule 4(d) (3). The other decisions referred to in the petition involve attempted service in this country upon Consuls or other agents or representatives of foreign sovereigns, who were found not to be authorized by appointment or law to receive service of process on behalf of their sovereigns in cases where jurisdiction *in personam* had not been consented to.

The second service by registered mail herein, subsequent to the effective date of Federal Rule 4(i),* not con-

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* Subsection 4(i) provides as follows:

"(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.

(1) MANNER. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the District Court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the Court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the District Court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) RETURN. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country or by order of the Court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the Court."

sidered by the courts below, was likewise proper service under the Federal Rules of Civil Procedure. It is not a condition of the validity of the second service that petitioner be regarded as a partnership, corporation or unincorporated association which is subject to suit under a common name. Rule 4(i) authorizes service upon "a party not an inhabitant of or found within the state where the District Court is held"—a description which abundantly covers petitioner—whenever same is authorized by the federal or state law referred to in Rule 4(e). Rule 4(e), as amended, provides, among other things, that whenever a statute or rule of court of the state in which the district court is held provides for service of a summons or of a notice upon a party not an inhabitant of or found within the state, service may be made under the circumstances and in the manner prescribed in the state statute or rule.

New York, by statutory law and court rule, allows extraterritorial service of petitions to compel arbitration by registered mail. *Gilbert* v. *Burnstine, supra; Prosperity Co., Inc.* v. *American Laundry Machinery Co., supra;* Section 7503(c) the New York Civil Practice Law and Rules, effective September 1, 1963, prior to the second service herein, replacing Section 1450 of the New York Civil Practice Act.

By reason of the presence of the special form of New York arbitration agreement stipulating that the arbitrators' award may be made a rule of the court, the fact that timely notice of the proceeding was concededly provided twice to the petitioner (removing any due process considerations), the fact that since amended New York Civil Practice Act provisions as made applicable by since amended Federal Rules of Civil Procedure were correctly applied by the courts below, and the fact that a second service was made herein which cannot be tenably challenged under the amendments to the Federal Rules of Civil Procedure, this case is scarcely one in which this Court

should endeavor to make a definite resolution of general problems pertaining to attempts made to serve foreign sovereigns and their agents as the petition suggests.

The compelling quality and soundness of the decision below and the fundamental fairness and correctness of the determinations made provide still another reason why the writ should not be granted.

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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